

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

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**NC TWO, L.P., as successor in interest to
BANK OF AMERICA, N.A., successor in
interest to FLEET NATIONAL BANK,
Plaintiff(s),**

-against-

**Index No. 3967/06
Motion Date: 1/31/07
Motion Cal. No. 40**

**QAB ENTERPRISES, INC.
and DONALD A. BERROUET,
Defendant(s).**

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The following papers numbered 1 to 9 read on this motion by plaintiff for an order pursuant to CPLR §3211 dismissing all of defendants’ affirmative defenses and pursuant to CPLR § 3212 granting summary judgment in favor of plaintiff and against defendants QAB Enterprises, Inc.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Affidavit in Opposition.....	5-6
Replying Affidavits.....	7-9

Upon the foregoing papers it is ordered that plaintiff’s motion for an order pursuant to CPLR §3211 dismissing all of defendants’ affirmative defenses and pursuant to CPLR § 3212 granting summary judgment in favor of plaintiff and against defendants QAB Enterprises, Inc. (hereinafter “QAB”) and Donald A. Berrouet (hereinafter “Berrouet”), is decided as follows:

According to the complaint, this is an action which seeks to recover amounts which are due and owing by reason of defendant QAB’s breach of a certain business line of credit known as a Small Business Credit Express Agreement (hereinafter the “Agreement”), as well as defendant Berrouet’s breach of a related personal guaranty (hereinafter the “Guaranty”). In support of its motion, plaintiff has submitted an affidavit of Brad Hrebenar, the Senior Vice President and Chief Information Officer of NC Ventures, Inc., the general partner of NC Two, L.P., (hereinafter “NC Two”), as successor in interest to Bank of America, N.A., successor in interest to Fleet National Bank. After reviewing and examining the applicable records, he stated that on or about March 14, 2005, defendant, QAB applied to a bank known as Bank of America, N.A. (hereinafter “Bank of America”) for a business line of credit which would permit defendant QAB to borrow sums of money from Bank of America. In response thereto, Bank of America offered to defendant QAB a business line of credit (hereinafter the "Line of

Credit") in the sum of \$25,000.00 pursuant to the terms of a Small Business Credit Express Agreement (hereinafter the "Agreement"). Pursuant to the terms of the Agreement and the Line of Credit, Fleet agreed to, and did, loan to defendant QAB a principal sum in excess of \$25,000.00. Defendant QAB accepted the terms of the Agreement by using the Line of Credit offered by Bank of America, and by borrowing a principal sum in excess of \$25,000.00 from Bank of America as permitted under the Agreement. In consideration of the Line of Credit extended and a principal sum in excess of \$25,000.00 loaned to it, defendant QAB, agreed to repay to Bank of America all amounts it borrowed from Bank of America, plus interest thereon, all in accordance with the Agreement. However, plaintiff claims that defendant QAB defaulted on and breached its obligations under the Agreement and Line of Credit by failing to make payments when due pursuant to the Agreement.

On or about November 15, 2005, Bank of America sold, assigned and transferred to NC Two all of Bank of America's rights in and to the Agreement, and any account receivable or debt obligation relating thereto. This included Bank of America's right to receive all payments due and to become due from defendant QAB pursuant to the Agreement and the Line of Credit. When NC Two purchased an assignment of the Agreement from Bank of America, NC Two did so for good and valuable consideration, in good faith, and without knowledge of any defenses which the defendants may have had. As a result of defendant QAB's default all of the obligations of defendant QAB, under the Agreement, have now become due and payable. According to plaintiff, QAB has failed and refused to pay the balance due of \$27,752.00 in principal and \$787.86 in accrued and unpaid interest which remains due and owing under the Agreement, despite plaintiff's demand, and said balance remains unpaid. Furthermore, under the terms of the Agreement and the Line of Credit, QAB agreed to pay NC Two all reasonable attorneys' fees and expenses incurred in collecting amounts due and owing under the Agreement and the Line of Credit.

Mr. Hrebenar also states that, on or about March 14, 2005, defendant Berrouet executed the Guaranty pursuant to which he unconditionally agreed to personally pay all of defendant QAB's obligations under the Agreement and the Line of Credit. Thereafter, on or about November 15, 2005, Bank of America sold, assigned and transferred to NC Two all of Bank of America's right, title and interest in and to the Guaranty. Plaintiff has made a demand for payment under the Guaranty, but payment has not been made. Plaintiff claims that, by reason of the Guaranty, defendant Berrouet is unconditionally indebted to NC Two for the sum of \$27,752.00 in principal and \$787.86 in accrued and unpaid interest, plus interest thereon from November 15, 2005, plus all reasonable attorneys' fees and expenses incurred by NC Two in collecting amounts due and owing under the Agreement, the Line of

Credit and the Guaranty. Plaintiff also points out that there are no other agreements between NC Two and the defendants other than the Agreement and the Guaranty and NC Two, has not waived its rights and remedies under the Agreement or the Guaranty, and at no time could such a waiver be inferred from NC Two's conduct.

In opposition, defendant Donald Berrouet, the President and CEO of QAB Enterprises, Inc., states that plaintiff has failed to satisfy its burden of proof by not submitting an affidavit of a person with personal knowledge of the facts and circumstances of any purported transaction between the parties. He also points to specific deficiencies in the proof, including the lack of any statements or checks reflecting the transaction. Defendant also denies that he ever applied for the subject line of credit or received a line of credit. Defendant claims that the affirmative defenses are proper and in particular the defense of plaintiff's failure to effect proper service is a matter that shall be addressed at trial, not in a motion.

The court shall first address the branch of the motion seeking summary judgment. In order to obtain summary judgment the movant must establish his or her cause of action or defense sufficiently to warrant the court in directing judgment in his or her favor as a matter of law. CPLR 3212. Here, plaintiff is not able to produce a copy of the Agreement or the Guaranty, because, as it claims, the instruments were lost. However, plaintiff claims that its evidence satisfies its burden to establish the existence of the instrument under UCC 3-804. This section provides the following:

The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court shall require security, in an amount fixed by the court not less than twice the amount allegedly unpaid on the instrument, indemnifying the defendant, his heirs, personal representatives, successors and assigns against loss, including costs and expenses, by reason of further claims on the instrument.

The comments to this section explain that, it is intended to "provide a method of recovery on instruments which are lost, destroyed or stolen. The plaintiff who claims to be the owner of such an instrument is not a holder as that term is defined in this Act, since he is not in possession of the paper, and he does not have the holder's prima facie right to recover under the section on the burden of establishing signatures. He must prove his case. He must establish the terms of the instrument and his ownership, and must account for its absence." Due to the possibility that the claimant might testify falsely, or the instrument might turn up in the hands of a holder in due course, and thereby subject the obligor to double liability,

courts are authorized to require security indemnifying the obligor against loss by reason of such possibilities.

Plaintiff claims it has met its burden of proving the existence and the terms of the Agreement and the Guaranty, including defendants' indebtedness to NC Two by virtue of the Agreement and the Guaranty. Plaintiff's evidence consists of an attorney's affirmation, the Hrebenar affidavit, a loan application, and an allonge that demonstrates, inter alia, plaintiff as the successor in interest to a note owned by Bank of America regarding a loan obligation of defendant QAB, in the amount of \$25,000.00.

This court finds that plaintiff has failed to satisfy the requirements of UCC 3-804. Plaintiff was required to submit due proof of ownership, and of the facts which prevent the production of the notes. Marrazzo v. Picolo, 130 A.D.2d 463 (2d Dept 1987.) Plaintiff has not submitted any document or copy of a document that contains a signature by defendants indicating their acceptance of the final loan terms or the receipt of any money on the purported loan. Nor has plaintiff submitted any document that indicates any type of instrument was issued to defendants for the payment on the loan or that an account was established for defendants to draw funds from. Significantly, this court finds the application for the loan does not establish the making of the loan. Furthermore, plaintiff's bald assertion that the Agreement and Guaranty were lost is not sufficient to show the reason why these documents cannot be produced pursuant to the statute. Without a showing of the efforts made to recover the documents, this Court cannot find them "lost" so as to satisfy plaintiff's burden under UCC 3-804.

The cases relied upon by plaintiff are not to the contrary of this Court's ruling, in fact, they are in support. In Marrazzo v. Picolo, the Court denied summary judgment based upon defendant's failure to submit sufficient proof of ownership of the note and the basis for not producing the document. In Guttman v. National Westminster Bank, USA, 146 Misc. 2d 391 (NY Sup Ct. J. Saxe 1990), the facts involved the issuance of a cashier's check and its mailing to plaintiff's address of record. The plaintiff asserted that it never received the check, the defendant claimed that it was not returned by the postal service. In about October 1988, the plaintiffs discovered that they had never received the proceeds of the Treasury bill, and they contacted the defendant. An action was then commenced to recover lost interest based upon a claim that transmittal of the check by mail was improper as a matter of law. The court held that as long as it is established as a factual matter that the check was drawn and mailed, the instrument may certainly be deemed "lost by destruction, theft or otherwise" as neither the drawer nor the payee nor any holder in due course claims to have possession of it. Consequently, in Guttman, there was not a dispute as to the ownership of the cashier's check

or the reason for its non-production, as exists in the instant case. Consequently, the branch of the motion seeking summary judgment is denied.

The branch of the motion seeking dismissal of defendants' affirmative defenses for lack of merit or failure to raise any issue of fact is decided as follows: Plaintiff claims that defendants' first, third, fifth, and sixth affirmative defenses essentially allege that NC Two's complaint fails to state a cause of action and that defendants' owe no monies to NC Two pursuant to the Agreement and the Guaranty. Plaintiff claims that these defenses are belied by the documentary and testimonial evidence before this Court.

A review of the complaint itself show that it complies with the pleading requirements of CPLR § 3013. The complaint sets forth all the necessary allegations to state a valid cause of action. Specifically, the complaint describes the nature of the underlying Agreement between the parties, the nature of the Guaranty between the parties, the assignment and chain of title of the Agreement and the Guaranty from the original assignor to NC Two, the nature of defendants' breach of the Agreement and the Guaranty, and the damages resulting to NC Two therefrom. As such, there is no basis in law or in fact for the an allegation that the complaint fails to state a cause of action. However, as set forth above, this Court does not find that plaintiff's documentary and testimonial evidence sufficiently establishes the existence of the Agreement and the Guaranty. Accordingly, plaintiff's evidence does not sufficiently establish that defendants' affirmative defenses regarding, in essence, the non-existence of any debt obligation on their part to plaintiff, are without merit. Accordingly, defendants' first, third, fifth, and sixth affirmative defenses are not stricken.

However, the second and fourth affirmative defenses have been sufficiently shown to be without merit and are dismissed. These defenses involve claims of contributory negligence, waiver, laches, estoppel, and ratification. Defendants have not submitted evidence that sufficiently refutes plaintiff's documentary evidence regarding these defenses so as to raise an issue of fact. CPLR 3211 (1). Accordingly, the second and fourth affirmative defenses are dismissed.

DATED: FEBRUARY 6, 2007

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ORIN R. KITZES, J.S.C.